United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2356

To be argued by
JULIA P. HEIT

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

PAUL IAN CHALEFF,

Appellant.

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, :

APPELLEE, :

- against - : Docket No. 74-2356

PAUL IAN CHALEFF, :

APPELLANT. :

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STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered September 23, 1974 in the United States District Court for the Southern District (Metzner, J.) convicting Appellant Chaleff after trial of unlawfully and knowingly possessing with intent to distribute a schedule one controlled substance in violation of Title 21 U.S.C. Sec. 841A. Appellant Chaleff was sentenced to serve a term of six months imprisonment and two years special parole.

Execution of sentence has been stayed pending appeal.

QUESTIONS PRESENTED

1. Whether the evidence was insufficient to establish beyond a reasonable doubt that appellant knowingly and willfully possessed a controlled substance with intent to distribute same or aided and abetted in the commission of this crime.
2. Whether absent a search warrant, the Agents' entry into appellant's apartment was unlawful, thereby requiring the suppression of all the evidence seized therein.

STATEMENT OF FACTS

INTRODUCTION

Appellant, PAUL IAN CHALEFF, was charged with conspiring to distribute or possessing with intent to distribute between August 30, 1972 and November 11, 1972 a Schedule I controlled substance in violation of Title 21 U.S.C. Sections 812, 841 (a) (1) and 841 (b) (B). It was also charged that he unlawfully and willfully possessed with intent to distribute a Schedule I controlled substance, to wit, 1099 pounds of a hashish-like substance containing tetrahydrocannabinal and marijuana, in violation of Title 21 U.S.C. Section 841 (A).

According to the indictment, his alleged co-conspirators were Peter Axelrod, Michael Floyd, James Krell, Harris Lesavoy, Steven Lieberman, Steven Miller, and Steven Abelman.

At his first trial, his co-conspirators were convicted as charged* but the jury could not agree on a verdict as to Appellant Chaleff (hereinafter referred to as appellant) and the court declared a mistrial as to him. On July 17, 1974 before the Hon. Charles Metzner, appellant again proceeded to trial on the same charges. At the conclusion of this trial, he was acquitted of the conspiracy charge but was convicted of the substantive charge.

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*Both Krell and Abelman had pleaded guilty to this indictment and appeared as Government witnesses in both trials. This Court affirmed the convictions of the other said co-conspirators on April 25, 1974. See 496 F.2d 984 (2d Cir., 1974)

GOVERNMENT'S CASE

AGENT GERALD HOCHMAN testified that on October 30, 1972 at 9:30 p.m. he and his informant went to 4601 Pskataway Avenue in New Brunswick, New Jersey where his informant introduced him to James Krell. (33)* Krell informed him that he had 500 pounds of hashish available for sale. It was then agreed that 500 pounds of hashish would be delivered to the Agent at a cost of $400 per pound. It was also agreed that the Agent would show the required sum of money to the informant who in turn would tell Krell that he had seen the money. (33,34) Krell stated that he was satisfied with this arrangement and would contact his people in Manhattan. He also mentioned to the Agent that 800 pounds of hash were stashed on the west side of Manhattan under the control of a Peter and Michael. (34)

According to Agent Hochman, he thereafter telephoned Krell at his New Jersey residence and Krell informed him that he had spoken to his salesmen who would do only 100 pounds which would cost $450 per pound rather than $400 per pound. When the Agent requested a larger delivery of hash, Krell replied that his people would be more comfortable with the 100 pounds. (35) It was then agreed that the Agent would call Krell the following day to confirm the deal. (35) Krell at this time also mentioned that the hash was stored in different parts of Manhattan, stating "it's like a bank with different deposits and different depositors". (36)

*Numerical references are to the pages of the trial transcript.

The following day on November 1st, a room was reserved at the Holiday Inn in Manhattan. (39) At about 1:00 p.m., Agent Hochman went to this room and later in the day Krell showed up with Floyd. (40) Floyd referred to a Peter as the source for the hashish and stated that Peter wanted to be sure of the Agent's intentions and would therefore deliver only 10 pounds. (40) Hochman insisted upon at least a 50-pound delivery. Since they could not agree on the amount, Krell stated that he would go to see Peter to ask if he would raise the order to 50 pounds. (42) At that point, Krell left the room and about an hour later, Krell telephoned to tell Agent Hochman that Peter could be reached at a public phone booth. (42) During their subsequent telephone conversation, Hochman and Peter reached an agreement that the initial delivery would be 50 pounds. (43) Thereafter, Krell returned to the hotel and told Agent Hochman that the two Stevens, his drivers, were circling the hotel in a car which contained a suitcase filled with 50 pounds of hashish. (43) According to Agent Hochman, no delivery was made that day because Floyd had seen some people on the stairwell and thought that they were the police. (44) Consequently, Krell and Floyd left the hotel, telling him that they would contact him later. (44)

Five days later on November 6th, Agent Hochman again called Krell in New Jersey. Krell told the Agent that he wanted to do the deal in the cellar of his home in New Jersey because it was crazy to do it at a hotel. (46)

From November 6th to 11th, Agent Hochman had a number of telephone conversations with both Krell and Axelrod. (47) On November 7th, when he tried to contact Krell, he spoke instead to a Steven Abelman who apologized for the aborted deal and stated that he was convinced that the Agent was okay.(48) Abelman also told him that he realized how valuable a customer he was. (48) Finally, Abelman told him that four people were involved who had invested the money and were responsible for bringing in the hashish. (49)

Subsequently, on November 8, 1972, Agent Hochman had dinner with Peter Axelrod at which time Peter mentioned that he had a "family" which was comprised of people who were in the hash business. The city was the distribution point. (54) According to Axelrod, he had one ton of hashish available. Agent Hochman negotiated for 500 pounds of this hashish at $450 per pound. (55) Axelrod agreed that 50 pounds would be at Krell's house in New Jersey when the Agent arrived there but Hochman told him not to send the hash until he got the money. It was then agreed that on November 11th Agent Hochman would telephone Krell before noon so that the 50 pounds would be there when he arrived. When the Agent paid for this amount, a car would be dispatched and another delivery of 150 pounds would be made. When the Agent paid for this 150 pounds, another 300 pounds would be delivered. (6) Accordingly, at about 2:00 p.m. on November 11th, Agent Hochman went to Krell's house and saw Krell and Abelman there. (60) He also observed 50 pounds of hashish packed in a suitcase. He acknowledged testifying before the Grand Jury that the hash was

wrapped in a garbage bag. (103) Additionally, the hashish was in one-pound bricks, all individually wrapped. (61) When another agent entered with the money, both Krell and Abelman were placed under arrest. (62)

Agent Hochman specifically stated that appellant's name did not come up in any conversation nor did he ever hear his name or his voice on any wire intercept. (56, A.9) Furthermore, he never saw appellant with the other men nor did Krell, Floyd, Axelrod, or Abelman ever mention appellant's name. In fact, he never met appellant or heard his name mentioned prior to his arrest. (56, 106-08, A. 9-12)

STEVEN ABELMAN testified that he was involved in the conspiracy to deliver hashish and that he was the driver. He stated that he had pleaded guilty to two counts of the indictment and had received a five-year probationary term. (111-113) He was specifically involved with Miller, Krell and Axelrod from whom he picked up the hashish in New York City. He knew that Axelrod and Lieberman were the sources of the hashish and that Floyd was the contact between Krell and the New York people. (114-15) According to Abelman, Miller was also a driver who would go to New York to pick up the hash and deliver it to New Jersey. (115) This witness met appellant in court only after he had been arrested. He never spoke to him on the telephone, met him personally, or heard his fellow co-conspirators mention his name prior to his arrest. As far as he knew,

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*Pages prefixed by the letter "A" refer to the pages of the Appendix. Included in the Appendix are all references to appellant in the Government's case.

appellant was not involved. (115-16, A.13-14)

JAMES KRELL, who had also pleaded guilty to the present charges, testified that in 1972 he had entered into a conspiracy to distribute narcotics. (118) In October of 1972, his friend, James Hicks, told him that he had someone who wanted to buy some hashish. (118) Hicks later introduced him to Agent Hochman in his house in New Jersey. (119) After their initial negotiations, Krell went to New York City to an apartment on Riverside Drive where he met Axelrod and Lieberman. A number of people were present at this time as a party was going on. Meanwhile, in the bedroom, he and Axelrod decided how they would arrange the deal. (120)

Two or three days later at the Holiday Inn in New York, he and Floyd met with Agent Hochman who said he wanted 200 pounds that day. They reached an impasse because the Agent wanted 200 pounds delivered all at once and Axelrod wanted to do it in small deliveries. (121-22) Finally, Krell went to see Axelrod at the Riverside Drive apartment and had Axelrod telephone Hochman to resolve the problem. (123) From the apartment, he, Axelrod, Lieberman, Miller and Abelman went to 71st Street and Columbus Avenue. (123) The four of them remained in the car and only Axelrod left the car, turning the corner on Columbus Avenue. He did not see where Axelrod went. (154) They waited in the car for about ten minutes until Axelrod returned with a plaid suitcase containing 50 pounds of hashish. (124) This witness acknowledged that the suitcase which Axelrod possessed could have been picked up anywhere in the vicinity, even in an automobile. (152) Lieberman and Axelrod left at that point, stating they were

returning to the Riverside Drive apartment. Krell and the others then drove to the Holiday Inn. The suitcase, however, was not delivered that day since Floyd was afraid that there were police around the hotel. (125) When they telephoned Axelrod to tell him that the deal collapsed, they were instructed to return with the suitcase to 71st Street and Columbus Avenue. (126)

Finally, Krell testified that arrangements were made for Agent Hochman to pick up 500 pounds of hash at his home in New Jersey. (134) It had been decided that 50 pounds would be given to him initially and the balance delivered in three installments of 150 pounds each. (134) Agent Hochman later arrived at his house in New Jersey and saw the hashish which was in a plastic bag in the suitcase. Perfume had been put on it to disguise the odor. When Hochman's money-man arrived, he was placed under arrest. (136-37)

Krell stated that appellant was not present at the meeting at the Riverside Drive apartment when the party was going on nor was he present during any negotiations at the Holiday Inn. In fact, Krell never talked to him nor did he hear anyone mention his name. (144-45, 148, A. 15-17) Krell admitted that he did not know anything about appellant and he thought that the telephone number that he had been given belonged to Lieberman. (165, 167, A. 18-19) He also never met Harris Lesavoy but had heard the name Harris mentioned once. (170)

AGENT ALBERT REILLY, who acted in a surveillance capacity, testified that on November 11, 1972, he had 270 Riverside Drive

under surveillance. At about 3:00 p.m., he observed Axelrod, Lesavoy, and Miller enter a Javelin driven by Miller. (177) He followed the car to 229 Columbus Avenue where Axelrod and Lesavoy left the car to enter the building. The Agent had never seen Lesavoy before. (178) About ninety seconds later, he observed Axelrod and Lesavoy leave this building. Each was carrying a suitcase. (178) When they approached the car, they were placed under arrest. Five or ten seconds later, Lieberman came out of 229 Columbus Avenue carrying a suitcase. (179) When Lieberman was arrested, Agent Cifuni searched him and asked for the keys. At first Lieberman was reluctant to turn over the keys but he complied with the Agent's order. Agent Reilly and other agents then entered 229 Columbus Avenue and went specifically to Apartment 3-N which is listed in appellant's name. (179-80, A.20-21)

The door had the name "Paul Chaleff" on it. Additionally, earlier that morning, there was an intercepted telephone conversation between Axelrod and Krell wherein Axelrod told Krell of a telephone number where he could be reached. This number was 212-874-6727 which was subscribed to by appellant at Apartment 3-N, 229 Columbus Avenue, New York City. Appellant's name was also on the mailbox. (181, A. 22) According to Agent Reilly, they first knocked at the door and since there was no reply, they used the key taken from Lieberman and entered the apartment to look for some more people and evidence. In a small room, he saw an open suitcase filled with what appeared to be hashish. (181, A. 22)

In describing appellant's apartment, the Agent stated:

> His apartment faced north, as you open the door you'll be looking down a long railroad corridor, if you will, a railroad flat. As you go down there's no rooms at all to the left, they are all to the right as you walk down it. The first door as I remember it, off the hall, would be the kitchen. The next one, would be this large walk-in closet, the next would be an "L" shape, would be the living room, and I believe off the living room you have a bedroom. (182-83, A. 23-24)

According to Agent Reilly, the open suitcase of hashish was found on the floor in the walk-in closet which was six feet by nine feet. In this room there was a loft on a platform which was about six feet off the ground but the Agent could not recall whether there was a mattress on the platform. (213, 222, A. 32, 36-37) There were both male and female clothing and books in this room. He did not know whether the clothing belonged to appellant or Lieberman as they were approximately the same size. (216, A. 34) They also found a letter addressed to Lieberman with appellant's address on it. (215-16, A. 33-34) Agent Reilly further recalled that there was a strong aroma of hash stating, "you know, I am not an expert but it appeared to be coming from the hash". (182, A. 23) The hashish in the other bags that were seized was wrapped first in garbage bags and then placed in the suitcases. (218, A. 35)

Thereafter, pursuant to a search warrant, they searched Lieberman's apartment on West 12th Street and found ten suitcases filled with hashish. They also seized hashish at Axelrod's

residence at 270 Riverside Drive. (184) The approximate weight of all the seizures totaled 1100 pounds. (185)

Agent Reilly further testified that he had never seen either appellant or Lieberman prior to their arrests. (186, A. 27) The Agents had learned the names of the suspects Krell, Axelrod, Lesavoy, Lieberman, Miller, Abelman and Floyd. (198, A. 28) Although approximately fifty telephone calls were intercepted from Krell's phone and he had listened to all the recordings, appellant's name was never mentioned. (201-02, A. 29-30) It was only from one intercepted communication on November 11th in which Axelrod gave Krell appellant's telephone number that the Agents formed the opinion that appellant's apartment could be a stash. (203, A. 31)

AGENT JEFFREY HALL testified that on November 11, 1972, he had 270 Riverside Drive under surveillance. (224) As a result of a radio transmission, he entered Apartment 1-C in the building. Appellant and two other girls were there. (226, A. 39) In the bedroom, he found an open suitcase filled with hashish. Both appellant and the Jones girl were placed under arrest. (227, A. 40)

Agent Hall did not know from where in the apartment appellant came but appellant had approached him. He had never seen appellant in the bedroom nor had he seen him touch the bag in any way. (236, A. 41) After the hashish was seized, appellant was placed under arrest. (237, A. 42) Appellant immediately asked if they had a search warrant and asked for a lawyer. (238, 242, A. 43-44) He made no attempt to flee.

Agent Reilly did not remember seeing any ceramic tiles in the apartment. (243, 244, A. 45-46)

DEFENSE

AGENT WILLIAM MITCHELL testified that he participated in the arrest of appellant at the Riverside Drive apartment. (273) When he had entered the apartment, appellant had already been arrested and was handcuffed. (274-75) Thereafter, at their headquarters, he took appellant's personal history. (276) The information pertaining to his address was taken from his driver's license. (277) Appellant also told him that he resided at 229 Columbus Avenue. (278)

FORMER AGENT MICHAEL PETERSEN testified that he also participated in appellant's arrest on November 11, 1972. (283) Although he had the apartment under constant surveillance that day, he did not see appellant enter. (285) Up to the time that he himself entered the apartment, he had no information concerning appellant. (290) Likewise, AGENT JOSEPH FEASER, who had participated in the investigation, never saw appellant prior to his arrest. (295)

AGENT KIERNAN KOBELL also saw appellant for the first time at the Riverside Drive apartment when he was arrested but did not see him enter. The Agent acknowledged that he had his gun drawn when he entered the apartment. (310) Agent Kobell never saw appellant in the room where the hashish was seized. (310)

STEVEN LIEBERMAN, presently serving a three-year sentence pursuant to his conviction under the present indictment, testified that he has known appellant for 14 years and that they were close friends. (313) He admitted his involvement in the conspiracy to distribute hashish in November of 1972 with Lesavoy, Axelrod, Krell, Floyd, Abelman and Miller. (314) According to Lieberman, Lesavoy, Axelrod and he were partners and they sold substantial amounts of drugs to Krell. Krell, in turn, had two drivers, Abelman and Miller, and it was Floyd who introduced Krell to Axelrod. (314)

In October of 1972, Lieberman stated that he had an apartment on West 12th Street which he used basically as a place to store the majority of drugs which they had. (315) Between October and November 11, 1972, he spent some time at both Axelrod's and appellant's apartments.* During a good part of the time that he was using appellant's apartment, appellant was in Europe as he had left in the middle of October and did not return until the end of October. (317) He had some clothes and books there and even slept there after appellant had returned from Europe. (318, 320) He also kept his passport there and received mail at appellant's address. (329)

According to Lieberman, he, Lesavoy, Axelrod, Nyan Fish who was a close friend of appellant, appellant's family, and people he worked with at City College all had keys to his apartment. (318-19)

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*According to Lieberman, after separating from his wife in 1969, he stayed at appellant's apartment regularly. (385)

Lieberman explained that after appellant had left for Europe, he and Axelrod decided that they would place some drugs in his apartment so said drugs would be more accessible to them. Some time after October 20th, both he and Axelrod brought several suitcases filled with drugs to appellant's apartment. (320) He never told appellant that he had brought these drugs to his apartment. (320) Each brick of hashish was wrapped in one or two cellophane bags and sealed with tape. (320) The drugs were then wrapped in two plastic garbage bags, tied shut, and placed in suitcases which were closed. (320) The reason he wrapped the hash in the garbage bags was so that the smell of the hash would be contained and according to the witness, there was no such smell in the apartment. (322) The suitcases containing the drugs were placed on the loft bed in the small room which appellant had given him to use for his own purposes. Finally, the suitcases were covered with blankets. (321)

On October 31st at a party at Axelrod's apartment on Riverside Drive, appellant and approximately 15 other people were present. (321-22) Appellant was not invited to a meeting that took place in the bedroom among Krell, Axelrod and himself because he was not involved in the business and they did not want to include an innocent person in the conspiracy. (321-23)

Thereafter, on the morning of November 11, 1972, Lieberman had breakfast with appellant in the latter's apartment. Axelrod then telephoned appellant and asked him to come to his apartment to install the ceramic mural that appellant had made for him. Lieberman knew beforehand that Axelrod would call appellant since

they wanted to get him out of his apartment. (325) Accordingly, at 1:00 p.m., appellant left the apartment and Lieberman stayed to prepare the hash that was to be picked up. Between 2:00 p.m. and 3:00 p.m., Axelrod and Lesavoy arrived. Each took a suitcase and left the apartment. He also took a suitcase and went downstairs. After he was arrested, the keys to appellant's apartment were taken from him.

Lieberman denied that he had told appellant that there were drugs in the apartment, that appellant ever received a share, or that appellant was a partner. (329)

On cross examination, Lieberman stated that both he and Axelrod were close friends with appellant and while they shared some confidences, they did not share all. (330-31) He graduated from CCNY in 1966 and when in school, he had sold some drugs to students but he did not sell drugs to appellant or sell drugs in his presence. (334) To his knowledge, appellant did not know that he was selling drugs. (334) Axelrod was also selling drugs at CCNY. (334) Appellant never asked him how he supported himself. (333)

According to Lieberman, bringing the six to eight suitcases filled with hashish to appellant's apartment was the biggest mistake he ever made. (340) They reason why they used appellant's apartment was because he and Axelrod were known drug dealers and appellant was not. (341) However, he did keep 700 pounds of hashish in his own apartment. (342) He had hoped that they would be able to move the stuff out of appellant's apartment right away but as it turned out, the hash was worthless and hard to sell. (366)

Lieberman further stated that appellant did not spend much time at his apartment since he had much work at CCNY and spent a lot of time at his parents' house where he had a studio. (372)

The first time he told the Government that appellant was innocent was in the New Jersey State Court in the last week. He had stated on the record that appellant had no involvement in September of 1973. (373, 377) This was after he had been convicted in the present case but before the New Jersey conviction. (373) In New Jersey, he had offered to plead guilty if he received concurrent sentences with the federal sentence, paid a $2,000 fine, and the charges were dropped against appellant. (383)

NYAN CHEE FISH, Registrar of Finch College, testified that she and appellant had lived together at 229 Columbus Avenue for a substantial time until the beginning of July 1972. (390) While she had lived at the apartment with appellant, there were times that Lieberman also stayed there. (395) They stopped living together because appellant was working in his studio and they could not spend much time together. (393) She retained a key to his apartment and knew that Axelrod, Lieberman and other people at school also had a key to his apartment. (392) According to Ms. Finch, most of her clothes were stored in the closet of the small room so she went there about three times to remove them. (394) There was a loft in this room which was six to seven feet off the ground with mattresses and blankets on it. (394)

She did not know that there were drugs in the apartment. She did not see drugs in the apartment nor did she smell drugs in the apartment. (395) Furthermore, she never heard appellant discuss drugs with Axelrod or Lieberman or handle the suitcases. (396)

MICHAEL REEVES FLOYD, also convicted of charges that he conspired to distribute hashish between October and November of 1972, testified that he had acted as a middleman in the transaction. He never heard of appellant or heard his name mentioned although he had heard or knew Axelrod, Miller, Abelman, Lieberman, Lesavoy and Krell. (399) To the best of his knowledge, appellant did not play any part in the scheme to distribute hashish. (402) He acknowledged that suppliers of drugs do not state where they are stashing their drugs. (404)

APPELLANT, 27 years of age, testified that he teaches in the Art Department at City College and is also a self-employed artist. He received his Masters Degree in 1972 and his specialty is ceramics. (405) According to appellant, he moved to 229 Columbus Avenue in September of 1968 but his voting address, car registration, and his driver's license have the address of his parents at 2284 Bronx Park East. (405) The following people had keys to his apartment at 229 Columbus Avenue: Nyan Fish, the lady next door, Lieberman, Axelrod, and others. It was common for people to stay over at his apartment including Lieberman who also stayed there on a number of occasions. (407)

After his return from Europe on October 30, 1972, and to the date of his arrest, he was occupied with particular projects. During the summer term at school, he had taken on the responsibility of having an Independent Projects Course with advanced students and they were in the midst of building a large ceramic mural which was not finished until 1973. Since it was such an immense project, he had to spend ten to eleven hours a day at school and had 14 students working with him. (410) He also did his own pottery work which necessitated the use of a kiln, potter's wheel, and clay. (411) According to appellant, City College had five such kilns and he was in a sense responsible for them. (411)

At City College in 1972 he had earned between $6000 and $7000. He also had his own show in July of 1972 and earned $1500 to $2000 by selling a few pieces. (412)

After his return from Europe on October 30, 1972, he recalled a gathering at Axelrod's apartment where slides were shown. (408) He did not discuss any drugs transaction with Axelrod, Krell and Floyd in the bedroom. (409) The first time that he remembered seeing Krell was when he was brought to trial a year ago and the first time he remembered seeing Floyd was in the West Street jail after his arrest in this case. (409)

Appellant further testified that the night before he was arrested he had slept in his own apartment. When he awoke in the morning, Lieberman arrived and had breakfast with him. At that point, Axelrod telephoned him to ask that he put up the mural in his apartment. (413) Axelrod then asked to speak to Lieberman. (415)

Appellant explained that the mural was a piece that he did not sell in his summer show so he gave it to Axelrod. Hanging this mural entailed a lot of work since it weighed 300 pounds and was eight feet by five feet. (414-15)

Appellant then left his apartment and when walking up the block to Axelrod's apartment he saw Lesavoy and Axelrod who told him that he would return shortly to help him. (415) Appellant stated that he was not particularly friendly with Lesavoy although they were acquainted. (416) At about 2:30 p.m. he started to put the mural up in Axelrod's apartment. He then went into the kitchen to have some coffee when Connie screamed out "Paul, help. There are guys here with guns. Help me." (417) Appellant ran out and saw Agent Kobell pointing his gun at him. They were told by the Agents that they were all under arrest for violating the narcotics law. He had no idea what they were talking about. (417) Therefore, he asked to see the Agent's identification and asked if they had a search warrant. (418)

Appellant stated that he had no idea that there was hash in the bedroom as he had not gone into the bedroom that day nor did he know that Lieberman and Axelrod had secreted hashish in his apartment. (419) Furthermore, he never gave them permission to store the hashish there nor did he conspire or agree to distribute or possess hashish. (419) He never received anything for the use of his apartment and did not commit the crimes charged. (419)

On cross examination, appellant testified that Axelrod, Lieberman and he were fairly close friends. (425) When asked if

they shared confidences, the witness replied "They were close friends. They weren't my wife or lover, you know.". (427) He did not know whether they were employed and he never asked Axelrod how he was able to afford his four-bedroom apartment on Riverside Drive. (428) He had no idea that Lieberman and Axelrod had been dealing at City College when they were students there. (429)

Appellant further stated that he never noticed the odor that was then emanating from the open hash in the courtroom in his apartment. (431) He never saw the suitcase in his apartment and when Lieberman stayed in his apartment, he used the loft bed. (435)

On redirect, appellant stated that when Agent Mitchell took his personal history after his arrest, he probably got the 2284 Bronx Park East address from his driver's license or hospital card that they took from his wallet. When the Agent also asked if he lived at 229 Columbis Avenue, he told them he did. He received mail at both addresses. (440)

Appellant presented five character witnesses in his behalf who all attested to his excellent reputation for honesty and good moral character in the community.

LILLIAN BLANKFIELD, a school teacher residing at 2284 Bronx Park East, had known appellant all his life. (445) HELEN DUFFY, administrative assistant in the Art Department at City College, knew appellant as a teacher in the Art Department and had daily contact with him. FLORIAN KRAMER, Associate Professor at City College, knew appellant for six years. In discussing appellant's

standing amongst the staff and his rehiring, appellant's reputation was beyond reproach. (457) JACOB ROTHENBERG, Professor of Art History at City College, is a member of the appointment committee which reviewed appellant's qualifications as a teacher each semester. At these committee meetings, it was discussed that his reputation for honesty was excellent. Finally, MERVIN JULES, artist and Chairman of the Art Department at City College, knew appellant both as a student and employee. When his professional qualifications were discussed, his reputation both as a human and teacher was excellent. (457-58)

SUPPRESSION HEARING

Prior to the first trial, a hearing was held to determine the legality of the seizure of drugs from appellant's apartment by the Special Agents.

The Government adduced the following facts:

At the end of October 1972, Agent Hochman met James Krell at his New Jersey residence to negotiate for the purchase of hashish. (H.5)* The delivery of this hash was to be made on November 1, 1972, at the Holiday Inn where Krell and Floyd were to meet Agent Hochman. (H.6) This deal was never consummated. After several telephone calls, plans were again made for the delivery of hash to Krell's house in New Jersey on November 11, 1972. (H.7) Before this, the Agents were aware of the involvement in this scheme of Axelrod, Krell, the two Stevens, Lieberman and Lesavoy. (H.143) Appellant's name was never mentioned at any briefing session. (H.182) They also knew that the hash was

*Numerical references preceded by the letter "H" refer to the pages of the Suppression Hearing.

distributed from several apartments on the west side of Manhattan. (H.8) Moreover, they were aware that the hashish was in suitcases, pre-packed and ready to go and that Axelrod had a loosely-knit family of traffickers in hashish. (H.8)

On November 11th, Abelman and Miller were to pick up the hash from Axelrod in the City and bring it in separate deliveries to Krell's home in New Jersey. When Abelman brought the hash to Krell's house, both he and Krell were placed under arrest. (H.117, 120)

In the meantime, Agents were conducting a surveillance of a Javelin at West End Avenue and 98th Street. At 2:55 p.m., Miller entered the car followed shortly thereafter by Axelrod and Lesavoy. (H.140) The car was followed to 229 Columbus Avenue. Axelrod and Lesavoy were observed entering this building and then exiting, carrying suitcases. Lieberman also exited this building carrying a suitcase. At that point, they were all arrested. (H.46) After the arrest, the Agents secured a key from Lieberman to appellant's apartment. (H.57)

The Agents did not know before the arrests in this case at which specific addresses the hashish was located. (H.16) The only connection appellant had to this case was through a wire intercept wherein Axelrod telephoned Krell to finalize the delivery plans and gave Krell a telephone number where he could be reached. This number was subscribed to by appellant at 229 Columbus Avenue, Apartment 3. (H.38,39) It was never explicitly mentioned in the interception that hash would be found at the apartment at 229 Columbus Avenue. (H.40) Other than this, they were not aware of

appellant's involvement. (H.39) It was further admitted that the first time it was learned that the apartment contained hash was when it was broken into and searched on the day of the arrests. (H.42) The Agents only had suspicions. (H.42)

The Agents had instructions to secure this apartment and to them this meant that they had probable cause to believe that a felony was being committed. (H.58) Before entering the apartment, no search or arrest warrant was obtained and the Agents did not know what they would find in the apartment. (H.58)

Hence, they knocked on the door of the apartment with their guns drawn. When the Agents did not hear anything, they used the key which they had obtained from Lieberman to enter the apartment. They did not know what was there or who was in the apartment. (H.59, 60) After finding no one there, an open suitcase which contained hashish was discovered by an Agent in a small room. (H.60,63) Four other suitcases were also observed and from the aroma which was very strong, the Agents could tell that it contained hash. (H.63) The entire apartment was searched. (483)

In a written opinion attached hereto as Appendix (A. 5-7) the Court denied appellant's motion to suppress the suitcase which allegedly was in "plain view" but granted the motion as to other suitcases and items seized.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT APPELLANT KNOWINGLY AND WILLFULLY POSSESSED A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE SAME OR AIDED AND ABETTED IN THE COMMISSION OF THIS CRIME.

Even accepting the facts in a light most favorable to the Government, there was a total absence of proof that showed or even tended to show that appellant knowingly and willfully possessed a controlled substance with intent to distribute it. The Government's proof at its best showed only that a quantity of hashish was secreted in appellant's apartment in a room used by his friend who admittedly was involved with others in the conspiracy to distribute the hashish. Since such proof in and of itself is insufficient to establish appellant's participation in the crime, his conviction must be reversed and the indictment dismissed.

The Government's case against appellant was predicated primarily upon the theory that appellant, as lessee of the apartment, constructively possessed the hashish that was found there. The Government would have been correct in advancing this supposition only if they proved that appellant had exclusive possession of the apartment for it is only from such exclusive possession that it could then be inferred that he both knew of the presence of and exercised control over the drugs. Evans v. United States, 257 F.2d 121 (9th Cir., 1958); United States v. Bonham, 477 F.2d 1137 (3rd Cir., 1973); United States v. Palmer,

467 F.2d 371 (D.C., 1972); United States v. Craven, 478 F.2d 329 (6th Cir., 1973). The Government failed to meet this burden.

The record instead demonstrates that appellant did not have exclusive possession of his apartment. The Government's own witness, Agent Reilly, testified that a key to appellant's apartment was taken from Lieberman's possession after he was arrested, thus enabling the Agents to gain access to the apartment. It is also apparent that Axelrod had access to the apartment when he told Krell that he could be reached at a telephone number subscribed to by appellant. Moreover, immediately before their arrest, both Axelrod and Lieberman, the prime movers in the conspiracy, were observed leaving 229 Columbus Avenue and carrying suitcases containing the contraband at a time when appellant was not in the apartment.

Appellant likewise presented evidence that readily supports the conclusion that he did not have exclusive possession of his apartment. At no time did the Government dispute his assertion that he gave his friends, including Axelrod and Lieberman, keys to his apartment, a fact corroborated by both Lieberman and Ms. Fish. Nor did the Government contest the defense assertion that Lieberman was such a frequent inhabitant of the apartment that he was given the small room, where the hashish was found, for his own use. In fact, the Agents even seized a letter addressed to Lieberman with appellant's address on it together with Lieberman's passport in the apartment. Additionally, the Agents could not tell whether the clothing found in the small room belonged to appellant or Lieberman since they were approximately the same size.

Since under these circumstances it cannot be claimed that appellant was in exclusive possession of his apartment, it was incumbent upon the Government to produce some other evidence establishing that he knew or even should have known that the contraband was there. United States v. Kearse, 444 F.2d 62 (2d Cir., 1971); United States v. Terrell, 474 F.2d 872 (2d Cir., 1973). This record is barren of any such evidence.

Clearly, the Government cannot rely on the fact that the open suitcase of hashish was found in plain view in the small room of the apartment since no proof whatever was offered that the hashish was so situated at a time when appellant was in the apartment or that he saw it there. Both Axelrod and Lieberman were in the process of removing the hashish from the premises to the waiting car when they were placed under arrest. Lieberman could just as well have left the suitcase there expecting to pick it right up but was precluded from so doing by his arrest.

Nor can the Government rely on the fact that the Agent testified that an odor was emanating from the open hashish which should have put appellant on notice that the contraband was in the apartment. Again, there is no proof that the hashish was in this exposed condition, emitting such an odor, when appellant was in the apartment or whether the two conspirators, Axelrod and Lieberman, temporarily left it in this state, expecting to remove it before appellant's return to the apartment. The crucial facts remain uncontested that appellant was not present in the apartment when the hashish was removed, he was not present when the open suitcase of hashish was seized, and finally, there is no proof

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that he ever saw this open suitcase of hashish in his apartment or knew it was there.

In any event, this record unequivocally demonstrates that the conspirators took great pains to prevent appellant from discovering the existence of the hashish in his apartment. First, Axelrod and Lieberman brought the suitcases to the apartment when appellant was in Europe. Second, they carefully concealed the scent of the hashish by wrapping each brick individually in cellophane and then placing the bulk in garbage bags before placing it in closed suitcases. Third, the suitcases were placed on a loft bed which was six feet above the ground and covered with blankets. Fourth, this loft bed was in a room which appellant had turned over to Lieberman's use and thus had no reason to frequent. And fifth, Axelrod and Lieberman deliberately planned to get appellant out of the apartment using the guise that he should put up the mural in Axelrod's apartment. Accordingly, based on these uncontroverted facts, there was absolutely no way that appellant could have known or did know of the existence of the hashish in his apartment.

While the Government at trial emphasized the fact that the odor of the hashish should have put appellant on notice that drugs were present in his apartment, no proof was offered at trial that such an odor would emanate from hashish that is so carefully wrapped. It must be pointed out that all the testimony referring to the scent of the hashish encompassed hashish that was not so wrapped (i.e., the hashish in the open courtroom, the hash that was left exposed, etc.). However, even if it were to be assumed

that an odor was discernible in appellant's apartment, there is no proof that appellant would or could attribute it to the drug or that he was sufficiently sophisticated in the use of drugs to be able to decipher its odor.

Furthermore, and even more important, there was a total absence of proof connecting appellant with the sale, distribution, or promotion of the hashish. No proof whatever was adduced showing that he participated in any discussion regarding the distribution of the hashish. Not one co-conspirator implicated him in any way in any telephone conversation or even mentioned his name. In fact, most of the conspirators were not even aware of his existence. Krell thought that the number given to him by Axelrod was Lieberman's telephone number. Appellant was not present at any meeting wherein the distribution of the hashish was discussed either among the co-conspirators or among the co-conspirators and the undercover Agents. It was never shown that he profited or stood to profit from the distribution of this hashish. Moreover, it was never shown that he had any prior dealings with drugs or engaged in any transactions at all that were drug related.

Ironically, the Agents, although they were aware of the existence of every other co-conspirator in this case, only learned of appellant's existence after his arrest. Even at that point, appellant exhibited no suspicious behavior. He made no attempt to flee and it certainly cannot be held against him that he asked the Agents if they had a search warrant when they barged into the Axelrod apartment with guns drawn. Nor can the Government claim that appellant tried to conceal his address when the Agent took

his personal history. It is quite obvious that appellant used two addresses interchangeably since both his driver's license and his voting address were still registered to his parents' home and the Agent evidently copied this address on the personal history form together with the Columbus Avenue address.* The Government never offered any evidence that appellant denied living at 229 Columbus Avenue address or was in any way evasive about his connection to the apartment.

Finally, it cannot be argued that the open suitcase of hashish found in the bedroom of Axelrod's apartment established that appellant should have been aware of the existence of the drugs both in this and at his own apartment. Again, the Government offered no proof that showed that appellant knew that the hashish was in this bedroom. No Agent saw him in the bedroom or ever observed him touch the contraband. See United States v. Kearse, supra; United States v. Henry, 468 F.2d 892 (10th Cir., 1972); United States v. Mallery, 460 F.2d 243 (10th Cir., 1972); United States v. Davis, 461 F.2d 1026 (3rd Cir., 1972).

This was the sum total of the evidence adduced against appellant. An examination of the cases establishing the criteria for the quantum of proof necessary in cases of this nature demonstrate without a doubt that the quantum of proof in the present

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*This personal history form is attached hereto in the Appendix, A. 8. It must be noted that the form sets forth the number of appellant's driver's license which appellant obviously could not have given him from memory. This tends to corroborate the fact that the Agent did take the address from the license and got the Columbus Avenue address from appellant which is also set forth on the form.

case fell far short of that which is required to sustain the conviction. See United States v. Craven, 478 F.2d 1329 (6th Cir., 1973) [where evidence of defendant's joint constructive possession of residence in which unregistered firearms and narcotics were found was sufficient to establish possession only because the gun was found in the master bedroom which the defendant used, he made incriminating statements regarding the gun, and most important, a witness testified that she purchased narcotics from the defendant in the basement where the narcotics were found in a secret compartment.]; United States v. Palmer, 467 F.2d 371, (D.C., 1972) [where defendant, who was sole lessee of apartment, was deemed to have constructive knowing possession of narcotics which were found in six different locations in his bedroom and where defendant's friend in testifying in his behalf gave an incredible story.]; United States v. Davis, 461 F.2d 1026 (3rd Cir., 1972) [where despite defendant's claim that she only lived at the apartment, it was held that she had knowing possession of the drugs found there as she was present at the time of the arrest and seizure and the narcotics and paraphernalia were spread out on the kitchen table.]; United States v. Bonham, 447 F.2d 137 (3rd Cir., 1972) [where it was held that the evidence was insufficient to establish possession of heroin by the defendant since the heroin had been found secreted away in the hidden recess of the doorway of the bedroom shared by the defendant and his half-brother.]. See also Williams v. United States, 418 F.2d 159 (9th Cir., 1969); Evans v. United States, 257 F.2d 121 (9th Cir., 1958).

Viewing the facts separately or collectively, there was nothing in appellant's conduct that would even suggest an inference of criminal activity. It cannot therefore be found that he even aided and abetted in the commission of the crime.

> In order to aid and abet another to commit a crime, it is necessary that the defendant in some way associate himself with the venture, that he participate in it as in something that he wishes to bring about, and that he seeks by his action to make it succeed. Nye & Nissen Corp. v. United States, 336 U.S. 613, 619 (1949) [quoting in part United States v. Peoni, 100 F.2d 401, 402 (2d Cir., 1930) - (L. Hand, J.)]

As pointed out, there is not a scintilla of evidence to show that appellant in any way associated himself with the venture or that he committed any overt act to make it succeed. In fact, the jury in acquitting him of the conspiracy charge failed to find any such overt act to connect him with the scheme to distribute the hashish. See United States v. Terrell, 474 F.2d 872 (2d Cir., 1973).

Hence, stripped to its essentials, this is a classic case of "guilt by association" which concept this Court has steadfastly refused to apply. United States v. Ragland, 375 F.2d 471 (2d Cir., 1967); United States v. Stromberg, 268 F.2d 256 (2d Cir., 1959); United States v. Bentvena, 319 F.2d 916 (2d Cir., 1962); United States v. Cimino, 321 F.2d 509 (2d Cir., 1963); United States v. Euphemia, 261 F.2d 441 (2d Cir., 1958). Appellant's only crime was his lack of judgment in his choice of friends and in his association with them. While appellant did not inquire into his friends' lifestyles, this is certainly understandable given the fact that he was preoccupied with his own life as an artist and

teacher at City College. It is inconceivable that appellant, whose character was given the highest ratings by his superiors at City College, would knowingly and deliberately commit the crime for which he was convicted.

Considering then, all the evidence in this case, it must be found that such evidence was insufficient to establish beyond a reasonable doubt that appellant knowingly and willfully possessed a controlled substance with intent to distribute the same or aided and abetted in the commission of this crime. Accordingly, his conviction must be reversed and the indictment dismissed.

POINT II

ABSENT A SEARCH WARRANT, THE AGENTS' ENTRY INTO APPELLANT'S APARTMENT WAS UNLAWFUL, THEREBY REQUIRING THE SUPPRESSION OF ALL THE EVIDENCE SEIZED THEREIN.

The record is crystal clear in this case that the Agents' entry into appellant's apartment was predicated only upon their suspicion that said apartment was being used as a "stash". (H. 42) As the Agents had no reason whatever to connect appellant with any illicit transaction, it was incumbent upon them to first obtain a warrant if they believed that his apartment was in fact being used as a "stash". Absent the necessary warrant, the Agents' entry into the apartment must be deemed illegal and the open suitcase of hashish which allegedly was in "plain view" must be suppressed as the product of this illegal entry.

It is well settled that reliance on the "plain view" doctrine must depend on the Agents' right to be in the location from which the view is obtained. McDonald v. United States, 335 U.S. 451 (1948); Coolidge v. New Hampshire, 403 U.S. 443 (1971). In this case the Agents had no right to enter appellant's apartment nor can their entry be justified under any existing theory of law.

This was not a search incident to a lawful arrest. On November 11th, the Agents were aware only of the involvement of Axelrod, Krell, Miller, Abelman, Lieberman and Lesavoy in the scheme to distribute hashish. (H. 143) Every single one of these conspirators was apprehended either in New Jersey or on the street in front of 229 Columbus Avenue. While the search of their persons or even the Javelin that was parked in front of the Columbus Avenue address can be validated as incident to a lawful arrest, by no stretch of the imagination can the Agents' subsequent search of the apartment be justified under this theory. Chimel v. California, 395 U.S. 752 (1969); Carroll v. United States, 267 U.S. 132 (1925). Chimel made it perfectly clear that a lawful arrest of a suspect outside his home could never by itself justify a warrantless search inside the house. Therefore, even if the Agents in this case had every reason to believe that these conspirators were using the 229 Columbus Avenue apartment as a "stash", the Agents still were not justified in subsequently searching the apartment. Once the accused were placed under arrest and were in custody, a search made at another place without a warrant was simply not incident to the arrest. Chimel v. California, supra.

Furthermore, the search cannot be sanctioned under the theory that the Agents had probable cause to arrest appellant and were entering the apartment to effect that purpose. The Agents did not even know of appellant's existence until after he was arrested at the Axelrod apartment. His name was never mentioned at any briefing session. (H. 182) And as stated previously, there was absolutely no proof during the entire three-month investigation that would have raised any suspicion, let alone probable cause, that appellant was involved in the plan to distribute hashish.

The only connection appellant had to this case was through a wire intercept wherein Axelrod had telephoned Krell to finalize the delivery plans and gave Krell a telephone number where he could be reached. Although this number was subscribed to by appellant at 229 Columbus Avenue, this factor alone is certainly not sufficient to demonstrate that appellant might have been even remotely involved in the conspiracy. In fact, the Agents could just as well have assumed that one of the conspirators used the alias of Paul Ian Chaleff since they knew nothing about this alleged person. Even more important, it was never explicitly mentioned in the intercept that hash would be found at the apartment at 229 Columbus Avenue or that appellant was in any way involved in the scheme. (H. 38-40) However, even if it be found that these facts focused suspicion on appellant, it cannot be said that these facts were sufficient to constitute probable cause to arrest him and thereby justify the Agents' entry into his apartment especially when they had no idea whether there was such a person known as "Chaleff" and whether or not he was in

the apartment. Ker v. California, 374 U.S. 23 (1963)

Finally, no exigent circumstances were present that would excuse the warrantless entry into the apartment. As far as the Agents knew, they had all their known suspects in custody. Consequently, there was no threat to their safety and if they did not know of any other suspects, they could not reasonably believe that there was a danger that any contraband that might be in the apartment would be destroyed. Moreover, it must be pointed out that this was a search of an apartment and not a car where the standards for a warrantless search are far more flexible as a car is moveable and the car's contents may never be found again if a warrant is obtained. Chambers v. Maroney, 399 U.S. 542 (1970). However, a home may not be searched without a warrant, notwithstanding probable cause, except in the most "jealously and carefully drawn" situations. Jones v. United States, 357 U.S. 493, 499 (1958); United States v. Mapp, 476 F.2d 67 (2d Cir., 1973). The Government never showed any such delineated situations in this case.

There can be no question but that the entry into appellant's apartment was prompted by the Agents' desire to conduct a general search for more people that might be involved in the conspiracy and to look for more evidence. The Agents admitted that they did not know what they would find in the apartment or who was in the apartment. (H. 58-60) They also admitted that it was learned for the first time that the apartment contained hashish when it was broken into and searched on the day of the arrests. (H. 42) In this context, it is difficult to reconcile the District Court's finding that the entry was valid with its express finding that

"the Agents were justified in making an immediate search of the apartment to see if there were any other persons there who were involved in the transaction." (emphasis supplied) The Court's own language supports the conclusion that the search in the instant case was a general exploratory search and under no circumstances have such searches ever been sanctioned by the Courts.

Additionally, the Court below in holding that the Agents' entry into the apartment was legal relied on this Court's decisions in United States v. Christophe 470 F.2d 865 (2d Cir., 1972) and United States v. Mapp, supra. The Court's reliance was misplaced.

First, in the Christophe case, the search of the defendant Pierro's house took place only after he was arrested in the house and was sustained only as a cursory examination to secure the premises. However, it was never contested in the Christophe case, as it was in the present one, that the Agents had no right to enter the premises in the first place. And in the present case as distinguished from Christophe, there was no search incident to a lawful arrest as no one was even in the apartment and the Agents, when they entered, did not know who they would find there. Hence, the cursory search to secure the premises that was conducted in Christophe cannot be condoned in the present case since the Agents had no right to enter the apartment without a warrant for any purpose.

Likewise in Mapp, supra, the search of the apartment was conducted as incident to an arrest made in that apartment and said arrest was clearly based upon probable cause since there was far

more evidence in Mapp than existed in this case for the Agents to believe that the apartment was a stash and that the defendant who was arrested there used it as such.

In sum therefore, because the "plain view" available to the Agents in this case was the product of an unlawful intrusion into the apartment, the evidence seized as a result of that intrusion must be suppressed.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

DECEMBER , 1974

RESPECTFULLY SUBMITTED

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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC

US COURT OF APPEALS: SECOND CIRCUIT

Index No.

USA,
Appellee,

against

CHALEFF,
Appellant,

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 16th day of Dec. 1974 at Foley Square, New York City

deponent served the annexed Brief upon

Paul J. Curran

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein.

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 16th day of Dec 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975